Advanced Intellectual Property Law Seminar:
Technology and Entertainment
Course Number 463-001
2 Credits

George Mason University School of Law
Professor Scott Bain

GENERAL INFORMATION

Class Meetings: Room 348, Hazel Hall, Wednesdays 8:00 p.m. - 9:50 p.m.
Instructor email: sbain@gmu.edu
Instructor phone: 703-967-9655 (cell)

I will set office hours TBD.

MATERIALS AND TOPICS

The course materials include cases, statutes, websites, articles, and other documents that you may access online through Westlaw, Lexis or the Internet, and/or that I will provide. We will not be using a traditional casebook or textbook. Reading assignments for the course are listed in the schedule below, along with all of the course topics. The order/schedule of topics presented below is an approximation. We will be having guest speakers during the seminar, and I may adjust the order of topics based upon availability of the speakers. Also, because this course is intended to cover the most current, relevant intellectual property issues in the technology and entertainment industries, some changes may be necessary to address new issues or cases that arise as the semester progresses.

GOALS FOR THE COURSE

This course is designed to (1) refine your creative problem solving ability and analytical skills, by examining novel or evolving legal issues at the intersection of technology and entertainment; (2) sample the most current and important IP issues in the technology and entertainment industries today, providing you with the tools and background to work in these areas; (3) introduce you to the typical parties in these industries and examine real-life case studies of their legal issues and strategies; and (4) engage you in-depth on one topic of your choice, ending with a term paper that you may wish to publish.

Special guests from the entertainment and technology fields will supplement our discussions of some of the issues in the course, and provide you with insights on their cases, and possible paper topics.

PREREQUISITES

It is recommended that you have taken at least one introductory level intellectual property-related course, or have roughly equivalent experience. If you do not, please discuss with me.

GRADES - PAPER

There is no written exam in this course. Your grade will be based upon a paper submitted following the end of the course, on a date TBD. We will discuss formatting, approximate length,
etc. in class. I am less concerned with the paper’s length than with the depth of thought, clarity of writing, persuasiveness of analysis, and sufficiency of legal support/citations.

The topic of your paper may be a further exploration of one of the subjects of this course, or some other intellectual property matter related to technology and/or entertainment. I will provide further guidance on the paper and possible topics during the course.

This is an interactive seminar, and you will be expected to prepare for and participate in class.

SCHEDULE AND ASSIGNMENTS

An approximate overview of the schedule and course topics is below, along with assigned reading for each. For some of the lengthier cases listed, I will identify selected portions of the case to read from week to week. I have also provided “optional” ideas for further reading on a topic if you wish, such as for exploring the topic for your paper, or other further study or professional preparation.

Week 1 (Aug 21)
• Quick Overview of Copyright, Trademark and Patent Principles.
• Used Book Stores, Academic Software, Redbox, and iTunes: Licensing versus the First Sale Doctrine.

Assigned Reading:

- Vernor v. Autodesk, Inc., 621 F.2d 1102 (9th Cir. 2010); 17 U.S.C. §109(a).
- UMG Recordings, Inc. v. Augusto, 628 F.2d 1175 (9th Cir. 2011).
- Examine the contract (whether termed a “license” or “user agreement” or “terms of use” etc.) of one of the software or media applications you use at home, such as iTunes, Microsoft Word, Adobe Acrobat, iPhoto, etc. Are you permitted to transfer or sell your copies of media (songs in iTunes, or the application itself for software like Word)? Are you limited in the purposes for which you are allowed to use it? (e.g., non-commercial) Is there any argument that this contract is non-binding and/or that you actually own your particular copy (whether you acquired a CD, downloaded to your hard drive, etc.)?

Optional:

- Vernor v. Autodesk, Inc., 555 F.2d 1164 (W.D. Wash. 2008) (district court’s analysis that was subsequently overruled by the Ninth Circuit).
- ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996) (J. Easterbrook’s discussion of whether shrinkwrap licenses are valid contracts).
Week 2 (Aug 28)
- Google Books, Kindle, and iPad: Copyright Fair Use and “e-borrowing” in Publishing.

Assigned Reading:

- 17 U.S.C. § 602(a)-(b)

Optional:

- *Omega S.A. v. Costco Wholesale Corp.*, 541 F.3d 983 (9th Cir. 2008).
- Amazon Kindle License Agreement and Terms of Use, Section 1: Digital Content, http://www.amazon.com/gp/help/customer/display.html/ref=hp_left_cn?ie=UTF8&nodeId=200506200

Week 3 (Sept 4)
- Google Books, Kindle, and iPad: Copyright Fair Use and “e-borrowing” in Publishing (Continued).
- Cybersquatting and Limitations of Trademark Online.
- ICANN (Internet Corporation for Assigned Names and Numbers) and the Expansion of Internet Top Level Domains
Assigned Reading/Viewing:


Optional:

- ICANN Uniform Dispute Resolution Policy (UDRP), http://www.icann.org/en/help/dndr/udrp/policy (see particularly Section 2, Your Representations).


**Week 4 (Sept 11)**

- ICANN (Internet Corporation for Assigned Names and Numbers) and the Expansion of Internet Top Level Domains: Cybersquatting and Limitations of Trademark Online (cont’d).

Assigned Reading:

- Transamerica Corp. v. Moniker Online Services, LLC, 672 F.Supp.2d 1353 (S.D. Fla. 2009); 15 U.S.C. § 1125(d)

- Compare the proposed “Rights Protection” rules in two of the competing applications for a new “.music” domain. (See Question 28 of each application, at the links below). How do these compare to the existing rules we have studied in the Transamerica case and other “.com” cybersquatting cases? What difficulties do you foresee in each applicant’s enforcement of their proposed policies, should they be awarded the .music top level domain?
.music application from .music LLC (group backed by major music industry trade associations): [http://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1659](http://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1659)

. music application from Google: [http://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/528](http://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/528)

**Week 5 (Sept 18)**

- **ICANN (cont’d)**
- **Hot News Doctrine/Copyright Preemption in Sports and Publishing.**

  Assigned Reading:
  
  - *Barclays Capital Inc. v. TheflyontheWall.com, Inc.*, 650 F.3d 876 (2d Cir. 2011).
  
  
  - Visit a fantasy sports web site to become familiar with the basic rules and the revenue model (if any) of the service. Should it matter whether the game charges a fee? Whether it earns advertising revenue? How frequently are the game statistics updated? Does the site appear to be sponsored by the professional league it covers? Should that affect the legal analysis?

  Optional:
  
  
  - *National Basketball Association v. Motorola*, 105 F.3d 841 (2nd Cir. 1997).
  

**Week 6 (Sept 25)**

- **Right of Publicity in Sports, and the NCAA**
- **Legal Protection of Software, “Business Methods,” and Sports Moves.**

  Assigned Reading:
  
  - *O’Bannon v. N.C.A.A.*, complaint
  
  
  - U.S. Patent No. 5,443,036  (Google patent search, or LEXIS)
- Using patent search tools such as those on Google or LEXIS, locate two issued U.S. patents relating to business methods, dance moves, or methods used in sports, exercise or play. Be prepared to discuss.

Optional:


**Week 7 (Oct 2)**

- Secondary Liability in Copyright and Trademark Law: Where the Technology and Entertainment Battles are Fought (Part 1).

  - Case Studies: the Recording Industry and file-sharing; the Motion Picture Industry and YouTube.

Assigned Reading:


- Read the German Supreme Court’s press release regarding Rapidshare. (type the following URL into Google Translate: http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=12288&Seite=1&nr=60931&linked=pm&Blank=1).

- Familiarize yourself with Megaupload and Rapidshare in advance of class, for discussion purposes. What are the terms of use, if any?

Optional:


Week 8 (Oct 9)
• Secondary Liability in Copyright and Trademark Law: Where the Technology and Entertainment Battles are Fought (Part 2).
  Case Studies: VCR to the DVR; Walkman to iPod

Assigned Reading:


Optional:

- *Cartoon Network, LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008)

Week 9 (Oct 16)
• The End of Copyright? Digital Locks, “Paracopyright,” and Anti-circumvention Laws

Assigned Reading:

- Copyright Office DMCA Rulemaking:

Optional:


- 17 U.S.C. §1003-1004 (Obligation to Make Royalty Payments: Digital Audio Recording Device and Digital Audio Recording Medium)

**Week 10 (Oct 23)**

- **The Cottage Industry of Administrative Law in Broadcasting and Music:** Rate settings, Consent Decrees, Compulsory Licenses, and PROs
  
  Rate Setting Cases in the Copyright Royalty Board: Satellite Radio, Internet Radio, Cable television, and more.

**Assigned Reading:**

- SoundExchange, Inc. v. Librarian of Congress, 571 F.3d 1220 (D.C. Cir. 2009)

- Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding — Ringtone Decision (October 16, 2006), [http://www.copyright.gov/docs/ringtone-decision.pdf](http://www.copyright.gov/docs/ringtone-decision.pdf)

- (Skim) 17 U.S.C. §§ 112 (Ephemeral Recordings), 114 (Public Performance of Sound Recording By Means of Digital Audio Transmission), 115 (Digital Phonorecord Delivery)

**Optional:**


- Royalty & Rate Setting Litigation, [http://jenner.com/practices/262](http://jenner.com/practices/262)


**Week 11 (Oct 30)**

- **Music Licensing, New Services, and New Media**

**Assigned Reading [files provided by Prof. Bain]:**

- Excerpt of Written Testimony of Cary Sherman (RIAA) Before the Copyright Royalty Board in the “Mechanical” Rate Proceeding, Docket 2006-3

- United States v. American Society of Composers, Authors and Publishers (ASCAP), in the Matter of RealNetworks and Yahoo, 627 F.3d 64 (2d Cir. 2010).
- Digital Performance Right in Sound Recordings and Ephemeral Recordings,
  (Mar. 9, 2011).

Optional:

- Complaint in UMG Recordings v. Escape Media, Inc. ("Grooveshark" case), 11-CV-8407
  (S.D.N.Y. Nov. 18, 2011).

- Michael A. Carrier, Copyright and Innovation: The Untold Story, (Univ. of Wis. L. Rev.

- UMG Recordings v. Escape Media, Inc., July 10, 2012 Order,


Week 12 (Nov 6)
- Blogs, Mashups, Facebook, and YouTube: User Generated Content, Fair Use, and
  Ownership of IP Online.

Assigned Reading:

- (Skim) Debra Halbert, Mass Culture and the Culture of the Masses: A Manifesto for

- Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003).

- Complaint in Fairey v. Associated Press, Case No. 09-CV-01123 (S.D.N.Y. Apr. 14,
  2009),
  http://cyberlaw.stanford.edu/files/publication/files/Fairey_v_AP_complaint_with_exhibit
  s.pdf

- Review the terms of your favorite social networking or content sharing site/forum.  Who
  is purportedly recognized as the owner(s) of content that is posted?  What licenses are
  purportedly granted?  To what extent are the parties (you, the site host, the ISP, etc.)
  granting rights they arguably are not authorized to grant?

Optional:

- “Halloween Mashup: ‘The Kings of Pop’ - Michael Jackson vs Justin Timberlake,”
  http://www.youtube.com/watch?v=rpSXTjzy0VQ

- Compare Facebook Terms of Use (http://www.facebook.com/legal/terms) with MySpace
  Terms of Use (http://www.myspace.com/Help/Terms).  What are the similarities and
differences with respect to how they treat ownership of user generated content, and the
  “licenses” they purport to grant (to themselves, their users, and others) with respect to use
  of such content?


- “A Fair(y) Use Tale,” [http://www.youtube.com/watch?v=CJn_jC4FNDo](http://www.youtube.com/watch?v=CJn_jC4FNDo)

**Week 13 (Nov 13)**

- **How Heavy the Hammer … The Pervasive Effect of IP Damages Statutes on Enforcement, Deterrence, Licensing, and Consumer Respect for IP Laws.**
  - Case study: Jammie Thomas, the million dollar file-sharer.
- **The evolving common law/Constitutional punitive damage limits in tort law … to what extent do they impact the intellectual property statutes?**

Assigned Reading:

- 17 U.S.C. §504

- Jammie Thomas case background/description:


Optional:


**Week 14 (Nov 20)**

- **Legislation in Intellectual Property: The Complex and Significant Role of Modern Lobbying, and Legislative History in Applying Recent IP Statutes.**
  - Case Studies: Stop Online Piracy Act (SOPA), Protect IP Act (PIPA), America Invents Act (AIA), Orphan Works Act and the photography industry
Assigned Reading:


Optional:


- Fight for the Future, “Protect IP/SOPA Breaks the Internet,” http://vimeo.com/31100268 (Video)

Deadline for your paper TBD.

**Background References for Paper:**


C. Steven Bradford, As I Lay Writing: How to Write Law Review Articles for Fun and Profit..., 44 J. Legal Education 13 (March 1994). [http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CCsQFjAB&url=http%3A%2F%2Fdigitalcommons.unl.edu%2Fcoli%2Fviewcontent.cgi%3Farticle%3D1086%26context%3Dlawfacpub&ei=8iFfUNn5I8W70AG0sIBQ&usg=AFQjCNEitRITxALs_DL3Tmn0UydmY_DXw](http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CCsQFjAB&url=http%3A%2F%2Fdigitalcommons.unl.edu%2Fcoli%2Fviewcontent.cgi%3Farticle%3D1086%26context%3Dlawfacpub&ei=8iFfUNn5I8W70AG0sIBQ&usg=AFQjCNEitRITxALs_DL3Tmn0UydmY_DXw)